STATE OF VERMONT
BOARD OF MEDICAL PRACTICE

In re:	)	**MPC 15-0203**	**MPC 110-0803**
	)	**MPC 208-1003**	**MPC 163-0803**
David S. Chase,	)	**MPC 148-0803**	**MPD 126-0803**
	)	**MPC 106-0803**	**MPC 209-1003**
Respondent.	)	**MPC 140-0803**	**MPC 89-0703**
	)	**MPC 122-0803**	**MPC 90-0703**
	)		**MPC 87-0703**

REPLY MEMORANDUM IN SUPPORT OF RENEWED MOTION TO DISMISS SUPERCEDING SPECIFICATION OF CHARGES

Respondent, David S. Chase, M.D., through counsel, files the following Reply Memorandum In Support Of His Renewed Motion To Dismiss the Superceding Specification of Charges.

MEMORANDUM

I. Introduction.

In its Opposition to Dr. Chase's Renewed Motion to Dismiss, the State has again chosen to simply ignore the legal and factual arguments advanced by the Respondent, displaying the same sort of hubris and dismissive attitude that has already resulted in a deprivation of Dr. Chase's constitutional rights. The State cannot wish away its unethical and unconstitutional conduct in this proceeding. Nor can the Board ignore that conduct or the legal precedents that require dismissal. It must dismiss the Superceding Specification of Charges at this time, either with or without prejudice. A decision requiring Dr. Chase, the State, and the Board to go through a second, expensive trial, the outcome of which will have no practical effect whatsoever, is directly contrary to the sound administration of this Board's limited resources and broad

power. If, as it claims, the State is truly worried that Dr. Chase will somehow surreptitiously apply for a license and reopen his long-defunct practice (an absurd proposition on its face), Dr. Chase does not object to an order requiring him to notify the Board in the event he ever chooses to reapply for a medical license, anywhere at any time, so that the State may assert whatever rights it may have to oppose licensure.

II. Discussion.

A. This Board Cannot Ignore The Vermont Professional Conduct Board's Recent Ruling That The Precise Type Of Conduct Committed By The Prosecutor Is Unethical, Unconstitutional, and Violative Of The Rules Governing This Proceeding.

In its Opposition, the State does not bother to respond to Dr. Chase's concerns regarding prosecutorial misconduct, contending that Dr. Chase is simply rehashing earlier complaints with no new legal or factual support.[1] Nothing could be further from the truth, and the State's refusal to even address the recent ruling of the Vermont Board of Professional Responsibility demonstrates a deep disrespect for this tribunal and the rights of the Respondent.

When Dr. Chase first made this Board aware of the State's efforts to discourage witnesses from talking with him, the prosecutor stood before the Board and explicitly represented that his conduct was in no way unethical and that Dr. Chase's arguments to the contrary were "frivolous." In light of this denial, the Board declined to address the admittedly uncomfortable issue of whether or not its own prosecutor had acted unethically and unconstitutionally toward Dr. Chase, and it imposed no sanction for the prosecutor's behavior.

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[1] The State actually spends the majority of its Opposition in an attempt to blow over a straw man argument not raised by Dr. Chase, citing and attaching cases supporting the proposition that collateral estoppel and res judicata do not bar this proceeding. Of course, Dr. Chase has never argued to the contrary. Rather, he contends that the Due Process Clause, notions of fundamental fairness, and the wise administration of this Board's powers require dismissal.

The State now knows, and has almost certainly been aware for some time, that the Board of Professional Responsibility issued a ruling in September 2005 in which it held that conduct identical to that in which the prosecutor engaged is unethical, unconstitutional, and violative of the Vermont Rules of Civil Procedure. At the point it became aware of that ruling, the State had an obligation to bring it to the Board's attention. Yet, the prosecutor did nothing to attempt to correct his prior representation to the Board that he had acted ethically at all times.[2] Rather, he was content to allow the Board to continue to believe that his conduct was proper, even when he knew it was not. The prosecutor's failure to correct his prior misrepresentation, and to then ignore the issue when re-raised by the Respondent, speaks volumes of his candor toward this tribunal.

More importantly, the Board of Professional Responsibility's decision provides new, unavoidable, and binding legal support for the conclusion that the prosecutor's conduct was illegal, wrong, and should not be tolerated. The Board of Professional Responsibility is the single most authoritative state agency on ethical matters involving attorneys. The Vermont Supreme Court has given it the task of determining when attorneys cross the line that separates zealous advocacy from unethical conduct. In light of that Board's decision, this Board cannot now avoid the conclusion that its prosecutor acted in a demonstrably unethical way toward Dr. Chase, however unpleasant and uncomfortable it may be to acknowledge that fact.

Indeed, for the Board to ignore the unethical conduct of its own attorney in a proceeding aimed at determining the ethicality of Dr. Chase's conduct, as the State invites it to do, would be so hypocritical as to undermine public confidence in the Board's procedures and thereby weaken its ability to police the profession and protect the public. In this matter, the State has charged Dr.

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[2] This sort of conduct appears to be par for the course. To date, the State has still not corrected the allegations in the Superceding Specification of Charges that reiterate portions of a falsified affidavit that Amy Landry later disclaimed under oath.

Chase with acting in an unethical and unprofessional manner toward his patients. It has asked the Board to impose the most extreme remedy available: permanent license revocation. At the same time, the State is asking this Board to turn a blind eye to the prosecutor's own demonstrably unethical behavior in prosecuting Dr. Chase. The Board should not adopt the State's shameful and hypocritical position as its own.

B. The Federal District Court's Recent Ruling Makes Clear That The Board Investigator's Falsification Of Evidence Undermines The Validity Of This Entire Proceeding.

As it has in the past, the State similarly fails to even address the undisputed testimonial and documentary evidence that the Board's investigator falsified key portions of Ms. Landry's affidavit. Once again, the State has declined to provide any countervailing evidence, choosing to totally ignore the Respondent's concerns other than to label them a rehash of prior arguments. But the recent findings by the United States District Court in Dr. Chase's criminal case cast the investigator's misconduct in a new light, and provides this Board with valuable guidance on the pervasive effect of a government agent's decision to falsify key evidence.

In the federal criminal case, the prosecutors failed to turn over to Dr. Chase important evidence of his innocence, in violation of the government's clear-cut constitutional duty. In light of the prosecutors' actions, Judge Sessions suggested that any verdict adverse to Dr. Chase would be meaningless:

> I will be honest when I say that I have some concerns about what a verdict would mean at this point. So if there's a guilty verdict, what exactly does it mean in light of the fact that some of this material was not disclosed.

(Dec. 13, 2005 Trial Tr. at 126.) He also immediately grasped and articulated the fact that prosecutorial or investigative conduct of this sort does not just damage the defendant's rights, it brings disrespect to the entire justice system:

> This is our system of justice. And . . . does that not bring disrespect to all of us that [the government] would end up arguing facts which may not be true? Or are not complete? Or are not thorough?

(*Id.* at 137.)

The Court was so troubled by the government's misconduct, that, despite the enormous investment of all involved, it still proposed dismissing the case without prejudice, and subsequently holding a month-long hearing on the Government's misconduct, because any guilty verdict would be unreliable:

> I appreciate the defense wants to go forward to a verdict if I don't dismiss [the case], but I have got a responsibility to the criminal justice system, and is any verdict [of guilt] at this point sufficiently reliable to be worthy of anything?

(*Id.* at 147.) In light of the fact that the government's misconduct was not discovered until the end of a three-month trial, Dr. Chase objected to dismissal without prejudice and requested that the case go to the jury instead. Of course, that jury acquitted him.

The federal court's concerns apply with even greater force where, as here, the State has not just withheld evidence, but has affirmatively falsified it.[3] Those concerns are supported by caselaw, which, unsurprisingly, holds that falsifying evidence is a fundamental due process violation. *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (the "principle that a State may not knowingly use false evidence" is so fundamental as to be "***implicit in any concept of ordered liberty***")(emphasis added); *see also United States v. Vozzella*, 124 F.3d 389, 392 (2d Cir. 1997) ("The fundamental unfairness of a conviction obtained through the use of false evidence has long been recognized by the Supreme Court."); *Devereaux v. Abbey*, 263 F.3d 1070, 1075 (9th Cir. 2001) ("***the wrongfulness of charging someone on the basis of deliberately fabricated evidence***

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[3] Of course, by discouraging witnesses from speaking with Dr. Chase's attorneys outside the prosecutor's presence, the State has also deprived Dr. Chase access to potentially important evidence. As discussed in Respondent's Motion, the combination of falsifying some evidence and protecting other evidence from disclosure creates an insuperable hurdle to a fair hearing.

is . . . obvious")(emphasis added). Amazingly, in its Opposition, the State contends that "Respondent did previously and dos [sic] not now cite to any persuasive authority that the conduct of the investigator or the assistant attorney general violated [his] due process rights." Apparently, the prosecutor did not bother even to read Dr. Chase's Motion before opposing it: That Motion includes each of the above citations and quotations. Whether through inattention or a lack of candor, the State once again advances a misleading argument.

The State's uninformed representations to the contrary, there is also ample caselaw supporting dismissal, either with or without prejudice, as an appropriate remedy for government misconduct, particularly when it involves the suppression or falsification of material evidence. *See, e.g., Government of the Virgin Islands v. Fahie*, 419 F.3d 249, 254-55 (3d Cir. 2005); *United States v. Osorio*, 929 F.2d 753, 760 (1st Cir. 1991); *United States v. Miranda*, 526 F.2d 1319, 1324 n.4 (2d Cir. 1975). As the Third Circuit stated in *Fahie*, dismissal is an appropriate remedy in cases of purposeful governmental misconduct "because those cases call for penalties which are not only corrective but highly deterrent." *Fahie*, 419 F.3d at 254-55. Indeed, presenting to the tribunal evidence that the government knows to be untrue is widely acknowledged as the single most serious form of misconduct. *See, e.g., United States v. Udechukwu*, 11 F.3d 1101, 1106 (1st Cir. 1993) (government's affirmative actions to mislead tribunal found indefensible); *United States v. Valentine*, 820 F.2d 565, 570-71 (2d Cir. 1987) (government's arguments contrary to known evidence deprived defendant of fair trial); *United States v. Universita*, 298 F.2d 365, 267 (2d Cir. 1962) (observing that the "prosecution has a special duty not to mislead; ***the government should, of course, never make affirmative statements contrary to what it knows to be the truth***" (emphasis added)). For the State to even suggest that there is no legal authority for dismissing a

case on due process grounds when an investigator falsifies evidence suggests that the State still possesses a dangerous misunderstanding of its role, and the role of the Board, in this proceeding.

As with the prosecutor's unethical conduct, a failure by the Board to address the uncontroverted evidence that its investigator falsified the Landry affidavit would send a message that the Board does not care if its employees act unethically and illegally while investigating charges of unprofessional conduct on the part of the medical profession. Again, the federal district court's actions in the criminal case set a good example: When confronted with evidence that federal prosecutors withheld exculpatory evidence, the court immediately declared the government's suppression to be "extraordinarily serious" and "shock[ing]," proposed dismissing the case without prejudice, and announced its intention to hold a month long evidentiary hearing to investigate the prosecutors' actions. By comparison, to Dr. Chase's knowledge, there has been no investigation, evidentiary hearing, or disciplinary proceeding commenced by the Board with respect to its investigator's conduct. Indeed, the Board has scrupulously avoided making any explicit finding that the investigator either did or did not falsify evidence. While the topic is unquestionably unpleasant, the Board owes it to the Respondent and to both the medical and legal professions to examine and decide the issue.

C. Dismissal, Either With Or Without Prejudice, Will Amply Protect The Public.

The State next argues that dismissal---even dismissal without prejudice---would put the public at risk because Dr. Chase could "renew his license" and "nothing [would] prevent[] him from reopening his practice and performing surgery." (Government Opp. at 7.) The Government's argument is nothing short of fanciful and again ignores the practical and legal realities of this case.

If, after dismissal without prejudice, Dr. Chase were to choose to reapply for a license to practice medicine in the future, the State could oppose that application for the very same reasons it seeks disciplinary action now. *Vermont Board of Medical Practice Rule 3.4* (reinstatement may be denied on grounds of unprofessional conduct as set forth under Vermont law). The State would have lost none of its rights or ability to re-raise its allegations at that time. If the State is truly concerned that Dr. Chase would surreptitiously seek licensure in another state---a concern that has no basis in the realities of Dr. Chase's situation---that concern can be allayed by an order requiring Dr. Chase to inform this Board of any license application he files at any place at any time. Dr. Chase would not object to such a condition of dismissal.

Of course, even if Dr. Chase were to regain his license immediately, there is no way he could or would "reopen his practice and perform surgery," as forecast by the State. The Board should recognize this specter for what it is: an effort to appeal to the Board's worst fears instead of its reason and experience. Dr. Chase is 70 years old. This Board's summary suspension and the attendant publicity forever destroyed his medical practice, and he will not and cannot reopen it. As a result of the suspension, he has not performed surgery in over two-and-one-half years, and there is no realistic prospect that he could operate again, even if he wanted to. In short, even if the State's allegations of unprofessional conduct were true, the summary suspension had the effect of halting Dr. Chase from practicing medicine as much as any final revocation could: it shut down Dr. Chase's practice and destroyed his reputation forever. There is no additional public protection that can be gained by further disciplinary action.

The State also suggests that it would be less able to prosecute this case in the future if Dr. Chase reapplied for a license because witnesses would disappear and forget. This concern is illusory. Every government witness in this case has been deposed and their testimony

transcribed. Most have also provided sworn testimony, on both direct and cross examination, at Dr. Chase's criminal trial. Transcripts exist of that testimony too. Safe in the knowledge that all evidence, both documentary and testimonial, had been preserved, the State agreed that a stay of this action was appropriate when the United States indicted Dr. Chase. The resulting one-and-one-half year delay has done nothing to compromise the State's ability to prosecute its case. In the unlikely event the State concluded that prosecution was necessary at some point in the future, the State could again pick up where it left off, with all of the relevant evidence and recollections preserved. The risk the State identifies is non-existent and carries no weight when balanced against the public and private resources necessary to conduct a month-long merits hearing that will have no practical consequences to the public.

Nor would dismissal indicate that the Board is not serious about protecting the public, as the State claims. Both the public and the profession know that this Board summarily suspended Dr. Chase's license, forever ending his practice. Both are also aware that, as a result of this Board's actions, Dr. Chase was prosecuted criminally by the federal government, the most serious proceeding that can be commenced against a doctor for his professional activities. The publicity attending both the Board and criminal cases has spawned 20 malpractice lawsuits against Dr. Chase, in which the plaintiffs parrot the claims that are included in the Superceding Specification of Charges and which were rejected by the criminal jury. It is inconceivable that any doctor or layperson---at least any Vermonter who has not been living in a cave for the past three years---could reach the conclusion that the State of Vermont does not take seriously its obligation to protect patients from substandard doctors. To the contrary, in light of Dr. Chase's acquittal and the conduct of state and federal investigators and prosecutors, the public and the profession may well conclude that the state and federal governments are overzealous in their attempts to fulfill

that obligation. Nothing that this Board either does or does not do to Dr. Chase in the future will change the fact that the Board has already very publicly exacted the ultimate price from him. The State's concern that the Board will appear soft on doctors is illusory, at best.

D. The Board Has The Authority To Dismiss This Case.

As its final reason for pressing forward with this case, the State once again trots out the nonsensical argument that the Board has no authority to dismiss this case without first holding a month-long merits hearing, regardless of the serious due process violations that have occurred. The Board has previously refused to accept the State's invitation to take such a dangerously narrow view of the Board's own power, and should do so again.

The State contends that only ***it*** has the power to dismiss charges prior to a formal merits hearing, regardless of the integrity of the evidence or the propriety of the State's actions in prosecuting them. This argument thoroughly understates the Board's authority and offends controlling statutory language, caselaw, and common sense. As an initial matter, the Board's enabling legislation clearly contemplates that the Board may dismiss charges against a Respondent for reasons apart from guilt or innocence:

> If a person complained of is found not guilty, ***or the proceedings against him are dismissed***, the Board shall forthwith order the dismissal of the charges and the exoneration of the person complained against.

26 V.S.A. 1361(c) (emphasis added). Section 1361 simply makes clear that if the Board determines that dismissal is appropriate, it "***shall***" formally order the dismissal and formal exoneration of the respondent. Put differently, the statute sensibly provides the Board with no choice other than dismissal when the facts and law require it.

The remainder of the Board's enabling legislation, as well as controlling caselaw, support this common sense reading of section 1361(c). In laying out the "powers and duties of the

Board," 26 V.S.A. § 1353 makes clear that the Board may "undertake any such other actions or procedures . . . required or appropriate to carry out, the provisions of this chapter." 26 V.S.A. § 1353(4). And as even the State acknowledges, the Supreme Court has stated that this Board has both the powers "expressly conferred upon it by the Legislature" and "such incidental powers . . . necessarily implied as are necessary to the full exercise of those granted." *Perry v. Medical Practice Board*, 169 Vt. 399, 403 (1999). Here, the Board has the power to bring charges of unprofessional conduct against a medical professional. *See* 26 V.S.A. § 1356. The Board also has the power to regulate the disciplinary proceedings before it. 26 V.S.A. § 1353. The power to bring charges against a doctor and to regulate the disciplinary proceedings necessarily carries with it the power to terminate those proceedings by dismissing the charges when the facts and the law require it.

Moreover, tribunals in both criminal and civil cases have the inherent power to dismiss charges in order to protect the integrity of the tribunal or the process itself from the dangers associated with demonstrated litigation misconduct. *United States v. Hogan*, 712 F.2d 757, 761 (2d Cir. 1983); *Shepherd v. American Broadcasting Companies, Inc.*, 62 F.3d 1469, 1472 (D.C. Cir. 1995) (courts have "inherent power" to dismiss for "litigation misconduct" in order "to protect their institutional integrity and to guard against abuses of the judicial process"). This policy weighs even more heavily in favor of dismissal where, as here, the adjudicative body also performs the investigative and prosecutorial functions. Because the Board acts as prosecutor, judge, and jury, it must go to great lengths to protect its proceedings from bias or even the appearance of bias. When confronted with sworn and uncontested allegations of misconduct by its investigator and attorney, the Board must act decisively to correct any prejudice caused to the Respondent and to the integrity of the proceedings. Its failure to do so will validly raise the

specter of bias and provide support for the notion that the Board is unfairly protecting its own employees and agents to the prejudice of the rights of medical professionals. Without this inherent power to dismiss, this Board's processes would be open to unlimited abuse by the State.

Despite this caselaw, the State once again appears to argue that the Board must enter a dismissal only if ***the State*** dismisses the proceedings against the Respondent. The State's conception of its own omnipotence is mistaken: The Board serves as more than a handmaiden to the prosecutor in these proceedings. Acting in its judicial capacity, the Board may dismiss the charges as required by the facts and law, and it may do so without first obtaining the State's permission. Nowhere is the Board's inherent authority to dismiss more important than when, as here, the reason for dismissal is the intentional misconduct of the State itself. To allow the State alone to pass judgment on the propriety of its own actions would be to render the Respondent's right to a hearing free of governmental misconduct utterly meaningless.

III. Conclusion.

For the reasons discussed above and in his Motion, Dr. Chase respectfully requests that the Board dismiss the Superceding Specification of Charges with prejudice. In the alternative, he requests that the Board dismiss the Charges without prejudice to the State re-bringing those charges if Dr. Chase reapplies for a medical license, either here or elsewhere.

Dated at Burlington, Vermont, this 24th day of February, 2006.

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